Supreme Court, U.S.
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# 92-440

No. _____

IN THE

# Supreme Court of the United States

October Term, 1992

JOHNNY E. SCRUGGS, JR.,

*Petitioner,*

V.

COMMONWEALTH OF VIRGINIA,

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether the Virginia court violated Scruggs' right to due process as guaranteed by the Fourteenth Amendment by refusing to grant Scrugg's Motion for Arrest of Judgment where the jury rendered inconsistent verdicts?

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## PETITION FOR WRIT OF CERTIORARI

Johnny E. Scruggs respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia in this case.

### OPINIONS BELOW

The opinion of the Roanoke City Circuit Court is unreported [App. infra, A1 - A5]. The opinion of the Court of Appeals of Virginia (February 20, 1992) [App., infra, B1 - B4] is unreported. The opinion of the Supreme Court of Virginia (June 10, 1992) [App., infra, C1] is unreported.

### JURISDICTION

The jurisdiction of this Court is invoked pursuant to the appellate jurisdiction granted to this court by Article II, Section 2, Clause 2 of the Constitution of the United States.

The judgment of the Court of

Appeals of Virginia was entered on February 20, 1992. A timely petition for appeal to the Supreme Court of Virginia was denied June 10, 1992.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1 of the United States Constitution provides in relevant part:

> " . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

### A. THE PARTIES

Petitioner is Johnny E. Scruggs, Jr. (Scruggs).

Respondent is the Commonwealth of Virginia.

### B. THE ACTION BELOW

#### 1. The Indictment

On March 5, 1990, Scruggs was indicted on fifteen counts of obtaining merchandise by false pretenses in violation of Section 18.2-178 of the Code of Virginia (1950), as amended. [CT 1.][1]

#### 2. The Trial

Scruggs plead not guilty to each of the fifteen counts of the indictment at his jury trial on November 19 and 20, 1990 in the Circuit Court of the City of

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[1] The Clerk's Transcript will hereinafter be designated as "CT." The Reporter's Transcript of the proceeding will hereinafter be designated as "RT."

Roanoke. The Court dismissed one of the counts against Scruggs, and the jury found him not guilty of three of the remaining fourteen counts, and guilty of eleven counts. [RT 276-277]. Scruggs entered a Motion for Arrest of Judgment because the jury had rendered inconsistent verdicts. [RT 280]. The court overruled the motion and in accordance with the jury verdict, fixed his punishment at two years in the State penitentiary on each of the eleven counts and assessed Court costs against him. [RT 284].

3. Scruggs' Appeal

Scruggs appealed the decision of the Circuit Court of the City of Roanoke to the Court of Appeals. The Court of Appeals denied Scruggs' Petition for Appeal on February 20, 1992. [App.,

infra, B1]. Scruggs then petitioned to the Supreme Court of Virginia, which petition was denied on June 10, 1992. [App., infra, C1].

C. STATEMENT OF FACTS

On February 4, 1990, an individual named Jeffrey Cooper was arrested while trying to cash a check at a Harris Teeter grocery store in Roanoke without proper identification. As a result of an investigation of this incident, Cooper was charged with 26 felonies in four jurisdictions for similar activities. Jeffrey Jackson was also arrested following the investigation of Cooper and charged with 15 felonies. Jackson and Cooper were friends.

The record shows that the Commonwealth's case against Scruggs was based solely on the testimony of Cooper

and Jackson who alleged that the crimes to which they had plead guilty were master-minded by John Scruggs.

Jackson testified that Scruggs had a remodeling business and that Scruggs had hired Jackson as a part-time employee in that enterprise in September of 1989. [RT 88]. Jackson introduced his friend Jeff Cooper to Scruggs. At that time, Jeff Cooper was living out of a car. Jackson stated that sometime in January of 1990, John Scruggs had directed Jackson to rent a storage facility, provided Jackson with the money for the ~~rental~~ and told Jackson to rent the facility in Jackson's name. Jackson stated that he followed Scruggs' directions and gave Scruggs four keys belonging to the two locks on the storage facility. [RT 92-93.] On or around

February 3, 1990, Jackson claimed that John Scruggs directed Jackson to type payroll checks belonging to J. L. Cooper Sales, making them payable to Jeff Cooper but did not tell him why. Jackson typed 20-25 such checks and gave them to Jeff Cooper. [RT 94-96.] Jackson, however, indicated at two other points in his testimony that Jeff Cooper paid him to write these checks, not John Scruggs. [RT 110.] The following day Jackson claimed that he drove a step van with Scruggs to Roanoke. Jeff Cooper also drove to Roanoke in another van. Jackson claims that he went to the mall and several tire shops. Meanwhile, Jeff Cooper went to stores alone and came out with merchandise which Cooper put in the van he had driven to Roanoke. According to Jackson, Cooper returned to the van

Jackson and Scruggs occupied five or six times and gave John Scruggs money, though he could not say how much. [RT 97 - 98.] Jackson stated they were all to meet back at a house owned by Scruggs on Richmond Highway where Scruggs kept his offices for his remodeling company which operated under "A-1 Home Improvement" and where Scruggs allowed Jeff Cooper to live. Scruggs' actual residence, however, was in Nelson County. [RT 100.] Jackson claimed that Cooper never showed up at the Richmond Highway address.

Sometime thereafter, Jackson was arrested and charged with 15 felonies. Under a plea agreement with the Commonwealth, the charges were amended, and he plead guilty to two misdemeanors. [RT 103-106.] Jackson claimed that he did not know that he was typing checks

that were not good nor that they were being used to obtain property illegally. He admitted that at the time he wrote the checks he needed money. He claimed to have plead guilty to misdemeanors only because he had written the checks and had speculated at the time he wrote them that they might be bad. [RT 112, 114.] Jackson further stated that he had no physical proof and no witnesses to prove that his testimony against John Scruggs was true. [RT 111.] The defense wished to elicit testimony from Jackson regarding the substance of the plea agreement between Jackson and the Commonwealth to show the bias of the witness; however, the Court disallowed the testimony after a Commonwealth objection.

Jeffrey Cooper testified that he was

introduced to Scruggs by Jackson in December, 1989, at which time Cooper admitted to living out of his car [RT 181.], and that Scruggs gave him jobs as a laborer and gave Cooper a place to stay in his garage at his residence on Richmond Highway. After Scruggs moved to Nelson County, Scruggs kept an office at the residence on Richmond Highway and let Cooper live in the Richmond Highway house. [RT 150-152.] Scruggs' business office at the Richmond Highway house was unlocked, and Cooper had full access to the office space, as well. [RT 215.]

Cooper stated that in December, 1989, he personally owed Kay Jewelers $2,300.00; that he had a checking account at Dominion Bank; that he had credit lines and actual debts at Thalhimers in the amount of $750.00, at Finks Jewelers

in the amount of $1,000.00, and that he owed other debts he could not specifically remember in the range of $700.00 to $1,000.00. [RT 208 - 210.] Cooper also admitted that he owed Scruggs $1,620.00 for rent on February 1, 1990, even though he claims to have only made $90.00 at his job at Electrolux during that period. [RT 210.] He also agreed that he probably had a personal debt of $6,000.00. [RT 211.] Cooper stated that Scruggs asked him about his background and what he would like to do. Cooper told Scruggs that he wanted to have his own business. Cooper stated that Scruggs then asked him whether he would like to make $80,000.00 and open a business named J. L. Cooper Sales. According to Cooper, Scruggs told him to open a post office box in Roanoke in the name of J. L.

Cooper Sales. [RT 154.] Cooper not only opened a post office box in Roanoke but also acquired a business license and opened a business account at Crestar Bank by himself, though he claims he did so with the advice and financial assistance of John Scruggs. [RT 155-156.] Cooper ordered business checks and said he deposited a total of $150.00 in the account, which money he obtained from Scruggs. [RT 157.] He further stated that John Scruggs got him business cards for J. L. Cooper Sales. [RT 158.] Cooper stated that the business checks arrived at the end of January, that Jackson typed the checks on February 3, 1990, and that Cooper signed all of the checks. [RT 159, 169.]

Cooper claimed that on January 31, 1990, he drove to Roanoke with Scruggs

and stayed in the van while Scruggs went to a number of businesses: PSI, K-Mart, Sears, Hechingers, Kay Jewlelers (in Lynchburg), Bowen Jewelry Store, etc., and that Scruggs wrote down all the things he wanted Cooper to get. [RT 159-160.] Several lists were introduced into evidence [RT 160.]; however, all but 5 of the 27 pages were in Cooper's handwriting [RT 189.], including the names and addresses of the businesses Cooper went to for merchandise. [RT 163.] Though Cooper claimed that he suffers from dyslexia, he also claimed this ailment did not affect his ability to transcribe information. [RT 215-216.] Cooper claimed that Scruggs went with him to get merchandise on a few occasions but that Cooper mostly went on his own and then brought the merchandise he had purchased

with his business checks back to either the Richmond Highway residence or to the storage building rented by Jackson. He stated that both Jackson and Scruggs had keys to the storage facility, while Cooper and Scruggs had keys to the Richmond Highway residence. [RT 167, 200.] Cooper not only used the checks to obtain merchandise but he also cashed checks at food stores and claims to have turned the money he had obtained in this way over to Scruggs. [RT 168.] Cooper admitted to using $10,000.00 worth of checks in two days. [RT 211.] He said the plan was that Scruggs would pay him at the "end" and would supply him with food, shelter and gas money [RT 179.], and that Scruggs planned for Cooper to "skip the state." [RT 170.]

Cooper was arrested on February 4,

1990, and was charged with 26 felonies in four jurisdictions. On the day Cooper was arrested after the Roanoke Police Department was called by Harris Teeter on February 4, 1990, where Cooper was trying to cash a check for $380.00 without proper identification, Cooper was driving a brown, 1985 GMC van, owned by Scruggs; however, Cooper had put his own tags on the van. He was convicted of four felonies and a misdemeanor and entered into the Community Diversion program. The defense was unable to elicit any details of any plea agreement between Cooper and the Commonwealth or testimony as to why Cooper was not prosecuted for the majority of the charges against him. [RT 173- 179, 221.]

None of the investigating officers from several jurisdictions who testified

at Scruggs' trial ever saw Scruggs prior to the trial or talked to Scruggs during their investigation, which included a search of the storage facility, the van, and the Richmond Highway address. [RT 43, 47, 59.] Investigator Hutcherson testified that no fingerprints were taken from any of the searched areas, or from any of the items which were seized. [RT 59-60, 66.] He also testified that no handwriting exemplars were taken and examined to corroborate any of Cooper's or Jackson's statements implicating Scruggs. [RT 60-61, 65.]

Investigator Lariviere testified that no search warrant had been issued for Scruggs' financial records or bank records to confirm information the police had received from Cooper or Jackson. [RT 79.] Lariviere also had no evidence that

any of the items seized belonged to John Scruggs. [RT 82.]

Two merchants, Joyce Bowles and Jack Mowbray, testified at the trial of Scruggs, but neither could identify anyone but Jeffrey Cooper as having purchased merchandise from them with a bad check. Following the testimony of these two merchants, it was stipulated that all the other merchants would testify to events concerning the passing of the checks which were exactly like the events which Bowles and Mowbray described. [RT 128]. The Commonwealth then enumerated from which merchants Cooper obtained merchandise by check and the value of that merchandise.

At the conclusion of the Commonwealth's evidence, Scruggs moved to strike the evidence. [RT 229.] This

motion was overruled. [RT 231]. Scruggs also moved to strike the testimony of Cooper and Jackson due to their unreliability and contradictory nature of their testimony, which motion was also overruled. [RT 233-235.] The defense renewed these motions at the conclusion of all the evidence, and the motions were again overruled.

After the jury returned its verdict, finding Scruggs guilty of eleven counts of the indictment and not guilty of three counts of the indictment, Scruggs moved to set aside the verdicts as being contrary to the law and the evidence. [RT 280.] The court overruled the motion. [RT 284.]

**REASONS FOR GRANTING THIS PETITION**

This Court should reverse the findings of the trial court since the rendering of opposite verdicts on evidence which did not vary from indictment to indictment is inconsistent with fundamental Constitutional principles of fairness and justice.

I. BY ACCEPTING AN INCONSISTENT VERDICT FROM THE JURY, THE COURT VIOLATED SCRUGGS' RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

The first inquiry that should be made in this case is a study of the evidence which was presented to support each of the charges against the defendant. Each indictment concerned the commission of larceny by false pretenses. Each indictment represented a separate

check that had been passed to a merchant. The Commonwealth and the defendant stipulated that the testimony of each merchant would be the same regarding each alleged offense.[RT 128].

The narrow question of law for the Court to decide is whether, outside the facts eliminated by an acquittal, the evidence remaining is sufficient to warrant conviction on the remaining charges. A conviction will not be allowed to stand unless the verdict of conviction is supported by evidence other than the facts pleaded in support of the counts where the defendant is found not guilty. Hohenadel Brewing Co., Inc. v. United States, 295 F. 489 (1924). The types of cases in which different verdicts on different counts of an indictment have not been found to be

inconsistent are those in which each count charges a separate offense based on different facts, and in which different victims and different witnesses were required to testify as to each count. Davis v. State, 229 Md. 139, 182 A. 2d 49 (1962).

Since the jury could only consider what amounted to the same evidence for each of the charges against Scruggs and relied on the same facts to support both the convictions and acquittals in this matter, his Motion for Arrest of Judgment should have been granted. Where there are multicount guilty verdicts, the guilty verdicts must be based on evidence other than that pleaded in support of the counts on which the verdict of not guilty is returned. Frisina v. United States, 49 F. 2d 733 (1931). "When the liberty

of a citizen is at stake, a jury will not be permitted to make a plaything of a verdict and blow hot and cold at the same time." Speiller v. United States, 331 F. 682 (1929).

The co-defendants, who had entered into a plea agreement prior to testifying, claimed that the checks were a part of a single fraudulent scheme. It is, therefore, beyond dispute that the evidence on each count was precisely the same on indictments which alleged the commission of the same offense. The simple question, therefore, is whether principles of substantive due process are violated when verdicts of both guilty and not guilty are returned regarding multiple indictments alleging the same offenses substantiated by matching evidence on each count.

Dunn v. United States, 283 U.S. 390, 76 L.Ed. 356, 52 S. Ct. 189, 80 ALR 161 (1932), sets forth a well-reasoned treatment of this same topic. Mr. Justice Holmes, writing for the majority, concluded that such inconsistent verdicts should not be the subject of speculation, and that a finding of not guilty on some counts does not necessarily mean that the jury was not convinced of the defendant's guilt. The Justice also cites the fact that these verdicts may have been the result of leniency, compromise, or mistake.

Mr. Justice Butler sets forth an impressive dissent declaring that when upon an indictment charging the same offense in different counts, the jury acquits as to one and convicts on the other, the defendant is entitled to a new

trial.

In this case, it was not the testimony of merchants which provided the crucial evidence against Scruggs. He certainly would have been acquitted if this evidence had been the only evidence. It was the testimony of the co-defendants which caused Scruggs to be convicted. Their tale of conspiracy and fraud told a single story of criminal conduct which must be either accepted or rejected as a whole. The co-defendants' testimony offered no differences in the method which they claim was employed with respect to the various merchants.

The standard of proof in criminal cases is much higher than the standard of proof in civil cases. The civil law employs many rules designed to avoid inconsistent verdicts. Besides such

theories as collateral estoppel, there is the well-established rule cited by Justice Butler which declares that conflicts between a special and a general verdict will result in the special verdict prevailing. If these methods are well-established and accepted when resolving monetary disputes, why should similar reasoning be discarded on more important issues involving the liberty of our citizens? Of all the issues which most affect public confidence in our legal system, the issue of consistent application of law seems foremost. To invite, and even to accept, varying results on the same subject is to cheapen the worth of every judicial proceeding. It certainly cannot be fundamentally fair for a judiciary which is charged to administer justice to reach dual opposite

conclusions on the same issue. Neither is it indecisive, nor burdensome, for a court to act in such a way to promote conformity in those unusual cases, such as here, where our judicial decrees reach an unnatural and inappropriate result.

**CONCLUSION**

This situation requires remedy by this Court. It is submitted that Johnny E. Scruggs' Petition should be granted.

September 8, 1992

Respectfully submitted.

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# APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ROANOKE

COMMONWEALTH OF VIRGINIA

v.

JOHNNY E. SCRUGGS, JR.

No. CR90-495
CR90-497
CR90-498
CR90-499
CR90-500
CR90-502
CR90-503
CR90-504
CR90-506
CR90-507

This day came the Attorney for the Commonwealth and Johnny E. Scruggs, Jr., born October 16, 1950, ssn: 228-72-8861, who stands indicted for a felony, to-wit: Obtain Merchandise by False Pretenses, which occurred on or about February 3, 1990, who was led to the bar in the custody of the jailer of this Court; and also came his attorney, Joseph A.

Sanzone.

Whereupon it appearing to the Court that the defendant's motion to set aside the jury verdict was taken under advisement from November 20, 1990, and upon consideration of the argument of counsel, the Court denied the defendant's motion to set aside the jury verdict, and exceptions were duly noted.

The Court, in accordance with the verdict of the jury, found the defendant guilty of Obtain Merchandise by False Pretenses as charged in the indictment.

Whereupon the attorney for the defendant moved the Court to run the sentences imposed against the defendant concurrently with each other, which motion the Court denied.

And it being demanded of the

defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to the law, and nothing being offered or alleged in delay of judgment, the defendant having waived a presentence investigation, it is accordingly the judgment of this Court that the defendant is hereby sentenced, in accordance with the verdict of the jury, to confinement in the penitentiary of tl is Commonwealth for the term of two years, and that the Commonwealth do have and recover against the defendant its costs, in the amount of $89.00, by it about its prosecution in this behalf expended within six months after his release.

It is further Ordered, as a further condition of the suspended sentence, that a blood sample be withdrawn from the

defendant for DNA (deoxyribonucleic acid) analysis. The sample is to be sent to the bureau of Forensic Science within fifteen days of the withdrawal of the sample, §§19.2-310.2 and 19.2-310.3 of the Code of Virginia, as amended.

After pronouncing sentence, the Court advised the defendant of his right to petition for an appeal to the Court of Appeals of Virginia, his right to proceed in forma pauperis and to have the assistance of Court-Appointed counsel.

And it is further Ordered that as soon as possible after the entry of this Order the defendant be removed and safely conveyed according to the law from the jail of this Court to the said penitentiary, therein to be kept, confined, and treated in manner as provided by law.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably represented the defendant.

And the defendant is remanded to jail to await transfer to the penitentiary.

Enter: February 19, 1991

/s/ Diane Strickland
Diane Strickland, Circuit Judge

# APPENDIX B

IN THE COURT OF APPEALS
OF VIRGINIA

on Thursday the 20th day of February, 1992.

Johnny E. Scruggs, Jr., Sometimes Known As John Edward Scruggs, Jr.,
Appellant,

vs.

Commonwealth of Virginia,
Appellee.

Record No. 0357-91
Circuit Court Nos. CR90-495, CR90-497 through CR90-504, CR90-506 and CR90-507

From the Circuit Court of the City of Roanoke before Judge Bray, Retired Judges Covington and Lam*

This petition for appeal is denied for the following reasons:

"Jurors may reach inconsistent verdicts through mistake, compromise or lenity, but in such instances, it is 'unclear whose ox has been gored, the government's or the defendant's . . . for

this reason and the fact that the government is precluded from appealing the basis for an appeal by the defendant." Wolfe v. Commonwealth, 6 Va. App. 640, 648, 371 S. E. 2d 314, 318 (1988) (quoting U. S. v. Powell, 469 U.S. 57, 65-66 (1984)). In this case, the Commonwealth produced evidence to support each charge upon which the jury made a finding of guilt. A finding of not guilty on some of the charges does not render these convictions invalid.

"When considering the sufficiency of the evidence on appeal of a criminal conviction, we must view all the evidence in the light most favorable to the Commonwealth and accord to the evidence all reasonable inferences fairly deducible therefrom . . . The jury's

verdict will not be disturbed on appeal, unless it is plainly wrong or without evidence to support it." Traverso v. Commonwealth, 6 Va. App. 172, 176, 366 S. E. 2d 719, 721 (1988). When this standard is applied to the testimony of the co-defendants as to the plan made by the defendant, the location and type of goods involved, and the premises upon which much of the merchandise was found, we find that the reasonable inferences to be drawn therefrom, and all the other evidence as to the false pretense and reliance thereon by the victims, does not allow us to conclude that the verdicts are wrong and without evidence to support them.

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* Retired Judges Kenneth M.

Covington and Henry L. Lam took part in the consideration of this case by designation pursuant to Code § 17-116.01.

# APPENDIX C

IN THE SUPREME COURT OF VIRGINIA

held at the Supreme Court Building in the City of Richmond on Wednesday the 10th day of June, 1992.

Johnny E. Scruggs, Jr.,
Appellant,

vs.

Commonwealth of Virginia,
Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

Justice Keenan did not participate in the consideration of this case.